Filed 10/6/04 In re R.B. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re R.B., Jr., a Person Coming Under the Juvenile Court Law.	B 172373 (Los Angeles County Super. Ct. No. CK 23942)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.B., Sr., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Patricia Spear, Judge. Reversed, in part, with directions.

John L. Dodd & Associates and Lisa A. DiGrazia for Defendant and Appellant.

Larry Cory, Assistant County Counsel, and Aleen L. Langton, Deputy County Counsel, for Plaintiff and Respondent.

David Alaynick, under appointment by the Court of Appeal, for Minor.

* * * * * *

Appellant, R.B., Sr., the father of minor, R.B., Jr., born in 1999, is once again before this court on both an appeal and petition for writ of habeas corpus and/or petition for writ of mandate. He appeals from an order of the juvenile court terminating his parental rights on January 6, 2004. Appellant concurrently filed a petition for writ of habeas corpus, and/or other extraordinary relief.

We reverse and remand the matter to the juvenile court with directions to order the Los Angeles County Department of Children and Family Services (the Department) to provide each Potawatomi tribe with proper notice of the proceedings under the Indian Child Welfare Act (ICWA). Since we conclude that the juvenile court did not err in terminating parental rights, if, after receiving notice under the ICWA, no tribe indicates the minor is an Indian child, then the juvenile court shall reinstate the order terminating parental rights. In all other respects, the order is affirmed. We deny the petition for writ of habeas corpus, except to the extent the matter is reversed and remanded for notice proceedings under the ICWA.

CONTENTIONS

Appellant contends that: (1) the Department and the juvenile court failed to comply with the ICWA because they failed to ask appellant if he had any Indian heritage and failed to investigate information indicating R.B., Jr., may be an Indian child; (2) appellant's former trial attorney and former appellate counsel provided ineffective assistance of counsel; (3) neither the June 21, 2001 disposition order, requiring appellant to participate in a drug rehabilitation program, nor the September 16, 2002 order terminating reunification services and setting a Welfare and Institutions Code section 366.26[1] hearing, were supported by substantial evidence; (4) appellant was denied his statutory and constitutional due process right to be present at the combined jurisdictional

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and disposition hearing; and (5) termination of appellant's parental rights deprived him of due process of law.

In his habeas corpus petition, appellant urges that his former trial attorney and former appellate counsel provided ineffective assistance of counsel and the Department and the juvenile court failed to comply with the ICWA.

FACTS AND PROCEDURAL BACKGROUND

This matter was previously before us when appellant appealed from an order of the juvenile court denying his section 388 request for modification, which we affirmed.

Rather than repeat the facts, we refer the reader to our opinion filed January 27, 2004, *In re R.B., Jr.,* No. B166808. Additional facts pertinent to this appeal are as follows. At the May 14, 2001 arraignment hearing, the minor's birth mother stated she did not believe she was related to any American Indian tribe. Nor had appellant told her that he was related to any American Indian tribe. On January 31, 2002, the juvenile court ordered initiation of an interstate compact on the placement of children with Wisconsin to consider placement of the minor with his paternal great-aunt Kathleen Holmes. On July 30, 2002 the Department reported that David Holmes was applying for a foster parent license and was of Indian heritage. Subsequent department reports indicated that the ICWA did not apply.

After appellant's appeal was denied, appellant continued his weekly visits with the minor, and attempted to telephone him regularly, but often the minor refused his calls. Appellant interacted well with the minor on most of these visits, but was criticized by the social worker for how he handled the minor's tantrums. During one visit, appellant pretended to tell someone on his cell phone that the minor was being bad because he was being destructive with his toys and that he was going to try to get him to be good. Afterward, the foster mother reported that the minor began hitting his head with toys that night, which she attributed to the father stating that he was a bad boy. Appellant was also criticized for attempting to kiss and hug the minor, even though the minor resisted his

advances. The foster mother reported that the minor had been hitting himself in the head during this time period.

On June 12, 2003, the juvenile court discontinued appellant's telephone calls with the minor, finding that the telephone calls were not productive.

During subsequent visits, appellant brought crayons, pencils and markers to the visits, and was criticized by the foster mother for having disobeyed a court order. The social worker, however, could find no reference to an order prohibiting appellant from bringing crayons, pencils, or markers to visits and allowed him to continue doing so. The October 2003 report indicated that appellant felt he had done everything requested of him and could not understand why his visits were not unmonitored. He felt it was unfair that he had been denied unmonitored visits due to a statement allegedly made by the birth mother to the minor's first foster parent that he and the birth mother were going to abduct the minor. He denied having made that statement or having the intent to abduct the child.

Upon the recommendation of the social worker, on October 2, 2003, appellant's visits were reduced to twice a month. At the hearing, the juvenile court stated its concern that appellant had "absolutely zero parenting skills," that there were a lot of negatives when there shouldn't be any, and that the visits did not seem beneficial to the minor. The social worker opined that since adoption was the permanent plan, reducing the visits would make the transition less difficult. After the visits were limited, the foster mother reported that the minor's behavior improved, nap time was easier, and the minor's nightmares stopped.

On January 6, 2004, the juvenile court terminated appellant's and the birth mother's parental rights to the minor.

This appeal followed.

DISCUSSION

I. Whether the Department and the juvenile court failed to comply with the ICWA

Under California Rules of Court, rule 1439(a)(1)(A) and (B),[2] an Indian child is defined as an unmarried person under the age of 18 who is a member of an Indian tribe, or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. Determination of tribal membership or whether a person is eligible for membership is an exclusive, conclusive decision by the tribe. (Rule 1439(g)(1).)

In any proceeding involving an Indian child, the court must "strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child." (§ 360.6, subd. (b).) Because the tribe's interest in the child is distinct but on parity with the interest of the parents, the ICWA requires notification of the Indian child's tribe of the pending proceedings and of their right of intervention if the court knows or has reason to know that an Indian child is involved in the termination of parental rights. (25 U.S.C. § 1912(a); *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 252 (*Dwayne P.*).)

Rule 1439(d) provides that: "The court and the county welfare department have an affirmative duty to inquire whether a child for whom a petition under section 300 is to be, or has been, filed is or may be an Indian child." The notice requirement is a continuing duty throughout the dependency proceedings. (Rule 1439(f)(1); *Dwayne P., supra,* 103 Cal.App.4th at p. 251.)

If the tribe determines that the minor is an Indian child for the purposes of the ICWA: "(1) the tribe may elect to exercise its jurisdiction or intervene in the matter; [¶] (2) active efforts must be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; [¶] (3) no foster care placement may be ordered absent clear and convincing evidence including qualified expert witness

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[2] All references to rules are to the California Rules of Court unless otherwise indicated.

testimony that continued parental custody is likely to result in serious emotional or physical damage to the child; [¶] and (4) the court may not terminate parental rights absent proof beyond a reasonable doubt including qualified expert witness testimony that continued parental custody is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(a)-(f).)" (*In re Pedro N.* (1995) 35 Cal.App.4th 183,188-189.) The ICWA also has special rules dealing with foster care and preadoptive placements.

In *Dwayne P.,* the court held that the notice requirement was triggered, even though the parents were unsure whether or not they were actually enrolled in a tribe. During the course of the dependency proceeding, the San Diego County Health and Human Services Agency (the Agency) stated in reports that the ICWA "does or may apply," but the tribe was unknown. (*Dwayne P., supra,* 103 Cal.App.4th at p. 252.) In paternity questionnaires, both parents claimed that the father did or might have Cherokee Indian heritage. At a jurisdictional and disposition hearing, the mother's counsel stated that the mother had some Cherokee Indian heritage. The juvenile court found that the ICWA did not apply, but asked the Agency to make further inquiries regarding the mother. Prior to the selection and implementation hearing under section 366.26, the parents raised the notice issue under the ICWA in a petition for extraordinary writ relief.

The appellate court held that in order to invoke the notice requirement, the Indian status of the child need not be certain and enrollment is not required, because each tribe's criteria for determining membership is different. (*Dwayne P., supra,* 103 Cal.App.4th at p. 254.) The court also noted that the Bureau of Indian Affairs has issued guidelines for the implementation of the ICWA which are considered persuasive, but not binding. (*Id.* at p. 255.) The guidelines provide that if any agency discovers information which suggests that the child is Indian, the notice requirement is triggered. (*Ibid.*) Rule 1439(d)(2)(A) also echoes the guidelines in that it provides that the notice provisions are triggered if a party, including the child, an Indian tribe, an Indian organization, an officer of the court, or a public or private agency provides information *suggesting* that the child is an Indian child.

Here, we conclude that the juvenile court failed in its duty to give the required ICWA notice that the minor potentially had Indian heritage. While the birth mother replied in the negative when she was asked if she or appellant were related to Indian tribes, an attachment to the Department's July 2002 12-month review report indicates that the race of a potential relative caretaker was listed as Indian. This information meets the criteria of rule 1439(d)(2)(A) that information suggesting the minor was an Indian child was available to the court. The court therefore had reason to know that the minor was potentially an Indian child, and should have made further inquiries of appellant. In the habeas corpus petition, appellant declares that he and the minor are descendants of the Potawatomi Indian tribe, but that he was never asked by the juvenile court or any agency if he was Indian. He believed his grandfather was a member of the Potawatomi tribe, and that his great-uncle was a chief. Since the notice requirement is a continuing duty, appellant properly raised this matter in the appeal and in the petition for writ of habeas corpus. (*Dwayne P., supra,* 103 Cal.App.4th at p. 261; *In re Marinna* (2001) 90 Cal.App.4th 731, 738 [where the notice requirements of the ICWA were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal].)

The Department's citation to *In re Aaliyah G.* (2003) 109 Cal.App.4th 939 does not support its argument that it and the court discharged its duty of inquiry. In that case, the father argued that the juvenile court did not make the legally required affirmative inquiry as to whether the minor had Indian heritage. Division Five of this district found that the Department and the juvenile court discharged any affirmative duty because the petition application was marked to show that the minor did not have Indian heritage, and the Department consistently thereafter reported that the ICWA did not apply. Unlike the situation here, in that case, neither the father nor any of the relatives ever suggested anything to the contrary, and there was nothing in the record to indicate that the minor had Indian heritage.

Nor is *In re O.K.* (2003) 106 Cal.App.4th 152, 157 particularly helpful to the Department. There, at the section 366.26 hearing, the juvenile court questioned the

paternal grandmother who stated she was not an enrolled member of a tribe and did not know whether she or the father was eligible for membership of the tribe. However, she stated that the father may have been Indian, based on where the family lived. The father, who was present, did not comment on the claim that he might have Indian heritage. The Third Appellate District concluded that the information provided by the paternal grandmother was not sufficient to give the juvenile court reason to believe that the minors might be Indian children. Rather, the grandmother's assertion that the father may have Indian blood in him was vague and speculative because it was only based on the nebulous assertion that the family was from a certain section of the country. Here, on the other hand, in response to a court-ordered initiation of an interstate compact with Wisconsin to consider placement of the minor with his paternal great-aunt Kathleen Holmes, the Department received a response that David Holmes was applying for a foster parent license and was of Indian heritage. Further inquiry by the Department would have revealed appellant's claim of Indian heritage.

The order of the juvenile court terminating the parental rights of appellant is reversed and matter is remanded to the juvenile court with directions to order the Department to provide each Potawatomi tribe with proper notice of the proceedings under the ICWA. Since, as discussed *post*, we conclude that the juvenile court did not err in terminating parental rights, if, after receiving notice under the ICWA, no tribe indicates the minor is an Indian child, then the juvenile court shall reinstate the order terminating parental rights.

II. Whether appellant's former trial attorney and former appellate counsel provided ineffective assistance of counsel

A. Trial attorney William Caldwell

1. Right to competent counsel

Section 317.5 provides that a parent in a dependency proceeding is entitled to competent appointed counsel. Constitutional due process concerns may also require the appointment of counsel. (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1709-1711.) In

order to prove ineffective assistance of counsel, the parent must show that counsel failed to act in a manner expected of reasonably competent attorneys practicing in the field of juvenile dependency law and that the claimed error was prejudicial. (*Id.* at p. 1711.)

Appellant contends that his trial attorney, William Caldwell, was ineffective because he failed to arrange for alternate counsel to represent appellant at the jurisdictional/disposition hearing; failed to request appellant's transport to the jurisdictional/disposition hearing; failed to seek appellate review of the disposition judgment; failed to file a timely petition for extraordinary writ pursuant to rule 39.1B; failed to argue termination of appellant's parental rights denied him due process of law under the Fourteenth Amendment to the United States Constitution; and failed to seek compliance with the ICWA. Appellant's main point seems to be that the requirement in the disposition orders that he participate in drug counseling was without basis, and that if he had been adequately represented, the order would never have been made. Thus, the termination of reunification services would not have occurred, which was based on appellant's failure to timely complete his drug program.

2. Arranging for alternate counsel

According to Caldwell's declaration attached to a section 388 petition filed on September 16, 2002, Caldwell was appointed by the court on May 14, 2001 when appellant was in federal custody. Due to a family emergency, Caldwell was unable to attend the June 21, 2001 disposition hearing, and could not arrange for counsel to appear for him. When he returned from Indiana, he did not review any minute orders or documents explaining the disposition case plan. He had no prior notice that drug abuse was an issue. He did not see the case plan until the six-month review hearing in January 2002. He then assumed wrongly that the Department would accept appellant's participation in out-of-state counseling for the drug counseling requirement and that the Department had some factual basis for including drug counseling in the case plan. He did not learn until June 2002 that the Department had rejected appellant's out-of-state counseling as inadequate.

We conclude that appellant has failed to show ineffective assistance of counsel. First, although Caldwell states that he was not able to arrange for alternate counsel, the June 21, 2001 reporter's transcript indicates that the birth mother's counsel was standing in for Caldwell. Additionally, the Department's answer to the petition for habeas corpus attaches a declaration from appellate counsel indicating that according to the juvenile court minute orders, Caldwell appeared on five matters on June 20, 2001, on seven matters on June 21, 2001, and on five matters on June 22, 2001. His declaration is therefore suspect.

Second, appellant has not shown that the outcome of the disposition hearing would have been more favorable to appellant had his attorney arranged for alternate counsel, rather than for the birth mother's counsel to stand in for him. The record shows that on July 30, 2002, Caldwell raised the issue at a court hearing that appellant had been enrolled in a drug program in Missouri. He also stated, "I don't even see a drug history upon -- that -- that would rise to the level of this concern that Mr. Alaynick is raising. I mean it's -- you know, my client was in federal custody on a drug-related charge. Is that the basis --" The juvenile court stated that the drug rehabilitation plan was based on appellant's incarceration in federal prison on a drug charge.

The record shows that Caldwell then filed a petition to modify the disposition order in September 2002, and the juvenile court denied it. At the hearing, Caldwell vigorously argued that there was no basis for the requirement of drug treatment plans and the disposition order. The juvenile court stated that the matter was moot because the current hearing was to determine whether appellant was in compliance. The juvenile court also explained that the basis for the drug counseling requirement was that appellant had been diagnosed by the Missouri Department of Corrections as a cannabis abuser; that his terms of probation required him to engage in drug counseling; that the counselors from the Missouri drug program opined that appellant was guarded in his participation in counseling; and that he had been arrested as a passenger in a car transporting 600 pounds of marijuana. The juvenile court determined that appellant was in denial of his drug

problems, that his testimony was vague as to the details of his drug counseling, and that appellant had received reasonable services tailored to his situation.

3. Whether the disposition orders should have been appealed

Appellant also argues that his trial counsel was ineffective because he did not seek appellate review of the disposition orders. However, as previously noted, his attorney filed a section 388 petition on September 16, 2002, requesting that appellant be relieved of the obligation to participate in drug counseling. The trial court denied that petition, and we have concluded that it did not abuse its discretion in doing so. Therefore, in light of that finding, appellate review would not have furthered appellant's interest.

4. Filing a rule 39.1B writ

Appellant also contends that his trial counsel failed to timely file a rule 39.1B writ petition. Instead, the writ petition that he filed did not contain a statement of the case and facts, nor any substantive law or argument regarding the juvenile court orders terminating appellant's reunification services. Appellant complains that the trial counsel merely filed judicial counsel forms stating that the transcript had been ordered and the summary of facts would be included with the supplemental points and authorities when the transcript was ready. However, as appellant concedes, we treated the writ as a petition for writ of mandate, and denied the writ on its merits, with a full review of the facts of the case.

We conclude that the filing of the rule 39.1B writ petition did not constitute ineffective assistance of counsel.

5. Transportation request

Appellant further contends that he was provided ineffective assistance of counsel because his trial counsel did not arrange for him to be transported to the disposition hearing. As we discuss in part V, *post*, we conclude that appellant was not denied due process rights when he was not transported to the disposition hearing.

It is unlikely that appellant's presence at the hearing would have changed the outcome of the case. First, the section 300 petition did not include any counts regarding appellant. Moreover, as we have already concluded, the juvenile court would not have changed its order requiring drug counseling. We therefore find that his trial counsel did not provide ineffective assistance of counsel in that regard.

6. Compliance with the ICWA

As far as trial counsel's failure to seek compliance with the ICWA, since on appeal, we are remanding the matter to the juvenile court with directions to order the Department to provide each Potawatomi tribe with proper notice of the proceedings under the ICWA, appellant has suffered no prejudice.

We conclude that appellant's ineffective assistance of counsel argument on that ground fails.

B. Appellate attorney Karen B. Stalter

Appellant also contends that his former appellate attorney, Karen B. Stalter, was ineffective because she failed to raise the issue of trial counsel's ineffectiveness and failed to argue lack of compliance with the ICWA. Both issues, however, have been addressed by appellant's current appeal, and therefore his ineffective assistance of counsel argument fails.

III. Whether the disposition orders and orders terminating reunification were supported by substantial evidence

Nor do we agree with appellant that the orders terminating reunification services and setting a section 366.26 plan should be reversed because they were not supported by substantial evidence. Appellant makes much of a letter dated September 13, 2002 from his probation officer that was not admitted into evidence. The letter states that appellant became more compliant during counseling, denied having urges to use marijuana, and was in a positive shift toward counseling. Even had the juvenile court refused the

admission of the letter in error, the fact remains that the juvenile court decided not to modify the disposition order based on appellant's demeanor and answers during the modification hearing. We cannot say that the juvenile court abused its discretion in terminating reunification services.

Appellant also urges that although he had been diagnosed with cannabis abuse, it was currently in remission (according to a letter from appellant's Missouri probation officer not available at the disposition hearing), every single drug test was negative, and the last time he used marijuana was in March 2003. He also claims that the juvenile court relied only upon the mother's hearsay statement that appellant drank a case of beer every night. Although appellant makes a compelling case that he substantially complied with the case plan, we conclude that the juvenile court did not abuse its discretion by terminating reunification services.

IV. Whether appellate review is required of the disposition orders and the orders terminating reunification services and setting a section 366.26 hearing

Appellant further urges that we should review on appeal both the June 21, 2001 disposition hearing ordering appellant to participate in a drug program, and the September 16, 2002 hearing terminating family reunification services and setting a section 366.26 hearing. He urges that the following extraordinary circumstances mandate our review: he was not transported to the jurisdictional/disposition hearing; Caldwell did not arrange for alternate counsel and the mother's attorney who represented him had a conflict of interest; Caldwell was ineffective; Caldwell failed to file a timely rule 39.1B writ petition. First, the disposition order was not appealed from within 60 days of its making, as required under section 395. Moreover, all of the arguments supporting appellant's contentions have been previously dealt with in this opinion, and have been found wanting.

V. Whether appellant was deprived of due process of law when he was not transported to the jurisdictional and disposition hearing

We disagree with appellant's contention that he was deprived of due process when he was not transported to the jurisdictional and disposition hearing.

In *In re Jesusa V.* (2004) 32 Cal.4th 588, our Supreme Court stated that there is no denial of due process where the prisoner parent is unable to attend because he is in federal custody and is represented by counsel. In that case, through his attorney, the biological father had the opportunity to call witnesses, cross-examine adverse witnesses, and present his own testimony in written form. Moreover, the father was present at the continuation of the presumed father hearing where his attorney was able to make statements on his behalf. The court cited *In re Axsana S.* (2000) 78 Cal.App.4th 262 for the proposition that "'due process rights of a prisoner who has been prohibited from participating in a custody hearing are not violated where the prisoner was represented by counsel at the hearing and was neither denied an opportunity to present testimony in some form on his behalf nor denied the opportunity to cross-examine witnesses.'" (*In re Jesusa V.,* at p. 602.)

In *In re Maria S.* (1997) 60 Cal.App.4th 1309, upon which *In re Jesusa V.* relied, the court held that although Penal Code section 2625 establishes a procedure through which state prisoners in California are able to attend dependency hearings, there is no procedure facilitating the attendance of out-of-state or federal prisoners. Nor does the absence of such a procedure require the juvenile court to suspend dependency proceedings. In making its decision, the court looked to the child's compelling rights to a stable and loving family. (*In re Maria S., supra,* at p. 1313.)

We find *In re Maria S.* is persuasive and are not convinced by appellant's argument that the case is distinguishable because appellant was in federal custody in California. *In re Maria S.* references lack of procedures available to transport a prisoner from federal custody, not the site of the federal court. Indeed, appellant cannot establish that procedures exist for transportation to the dependency proceedings. He merely urges that the bailiff, in answer to the juvenile court's question whether the court had the ability

to transfer appellant to the dependency hearings, stated: "I wouldn't say no, but [¶] . . . to go through the federal courts," indicates that "it might [have been] possible to procure [a]ppellant's presence." Nor are we convinced otherwise by appellant's argument in his habeas corpus petition that Caldwell has since conducted additional legal research and now believes that a writ petition may be filed requesting the transport of inmates in federal custody to state court proceedings. Appellant cites no authority in support of this theory.

We conclude that appellant was not denied due process of law when he was not given transportation to the jurisdictional/disposition hearing.

VI. Whether termination of appellant's parental rights denied him due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution

We next address appellant's assertion that the termination of his parental rights denied him due process of law.

While a parent's liberty interest in the companionship, care, custody and management of his or her child is a compelling one, the welfare of a child is a compelling state interest that allows the state to interfere with the parent's liberty interest. (*In re B.G.* (1974) 11 Cal.3d 679, 688; *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

Our Supreme Court has determined that the procedures provided in section 366.26 for termination of parental rights comply with the constitutional requirements of due process. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) In order to terminate parental rights at a section 366.26 hearing, the juvenile court need only find that (1) there is clear and convincing evidence that the child will be adopted; and (2) there has been a previous determination that reunification services shall be terminated. (*Cynthia D.,* at pp. 249-250.) At the section 366.26 stage, the child's right to a stable and loving family is at least as compelling to the parent's right to the care and companionship of his or her child. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609.)

Appellant complains that the juvenile court and the Department wrongfully denied him his right to visit the minor by unreasonably failing to liberalize his visits; by permitting the foster family to take the minor out of state for over one month prior to the section 366.26 hearing; and by preventing appellant from having reasonable visitation with his child. The record shows that appellant's difficulty in establishing a bond with his child was originally of his own causing -- he was incarcerated in federal prison, then living in a court-ordered halfway house in Missouri. Moreover, appellant's denial of his drug problems and failure to complete the drug counseling program until after his reunification services were terminated also contributed to the juvenile court's reluctance to liberalize visitation. Despite appellant's contention that the juvenile court prevented his visitation by allowing the foster parents to take the minor out of state for a month, the record shows that the juvenile court ordered that the foster family return earlier than scheduled so that appellant would miss only one visit, instead of two, during the month. The impact appears relatively minor.

We do not agree with appellant's argument that reversal per se is required here. A compelling fundamental error mandating reversal does not exist here. (*Rose v. Clark* (1986) 478 U.S. 570, 578.) Nor do we agree that with additional visitation, appellant would have fit within the exception of section 366.26, subdivision (c)(1)(A) that the benefit of maintaining the parent-child relationship outweighed the benefit of adoption. To meet the burden of proof for this exception, parents must show more than frequent and loving contact or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) It would be hard for us to speculate that more liberalized visits, or one extra visit during the time the minor was taken out of state, would have outweighed the benefit of adoption in light of the strong, positive attachment the minor exhibited to his foster parents.

DISPOSITION

The order of the juvenile court terminating the parental rights of appellant is reversed and matter is remanded to the juvenile court with directions to order the Department to provide each Potawatomi tribe with proper notice of the proceedings under

the ICWA. Since we conclude that the juvenile court did not err in terminating parental rights on the other grounds raised by appellant, if, after receiving notice under the ICWA, no tribe indicates the minor is an Indian child, then the juvenile court shall reinstate the order terminating parental rights. Except to the extent that the matter is reversed to provide notice of the proceedings under the ICWA, the habeas corpus petition is denied.

NOT FOR PUBLICATION.

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We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST